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No. 07-630
IN THE
SUPREME COURT OF THE UNITED STATES

MARY SCOTT,
Petitioner,
v.

METROPOLITAN HEALTH CORPORATION,
Respondent.

On Petition for Writ of *Certiorari* to the
United States Court of Appeals for the Sixth Circuit

MOTION AND AMICI CURIAE BRIEF OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND NATIONAL WHISTLEBLOWER CENTER IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

1. Whether it is a violation of the Due Process Clause and an abuse of discretion for a court, pursuant to its "inherent powers," to issue sanctions against a party without holding a hearing as to any aspect of the litigation, where the sanctions—amounting to over $1,600,000—rely on findings that the party has acted with subjective bad faith and that she, not her attorneys, was "the driving force" behind any litigation misconduct.

2. In connection with meritorious proceedings under the False Claims Act, which resulted in payment of over $6,250,000 by the *qui tam* relator's employer, did the Sixth Circuit err in affirming $1,600,000 in attorneys' fees against the relator based on alleged litigation misconduct that affected neither the disposition nor the duration of her whistleblower retaliation action, which should have survived summary judgment based on established principles of employment law?

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MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

Pursuant to U.S. Supreme Court Rule 37.2(b), the **National Employment Lawyers Association (NELA)** and the **National Whistleblower Center (NWC)** move this Court for leave to file this *amici curiae* brief.[1]

Petitioner Mary Scott, through counsel, gave consent to file this brief.[2] Respondent Metropolitan Health Corporation, after timely notice to its counsel of the intention of amici curiae to file this brief, indicated that it would not consent. The movants' interests are stated herein.

STATEMENT OF INTEREST

The **National Employment Lawyers Association (NELA)** is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. NELA advances employee rights and serves lawyers who

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[1] No counsel for any party to this action authored this brief in whole or in part. Furthermore, the amici and their undersigned counsel bore the full cost of preparation and submission of this brief, and no other person or entity made any monetary contribution to the preparation or submission of this brief.

[2] Letters of Mr. Frederick M. Gittes dated November 28, 2007, consenting to the filing of this brief are submitted to the Clerk of this Court with this brief.

advocate for equality and justice in the American workplace. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

As an organization focused on protecting the interests of employees who are treated illegally, NELA has an abiding interest in ensuring that sanctions against such workers and their lawyers are not routinely issued, but rather are reserved only for egregious cases. The aim of NELA's amicus participation has been to cast light not only on the legal issues presented in a given case, but also on the practical effect and impact the decision in that case may have on access to the Courts for people who have been unlawfully treated and for their advocates in litigation.

NELA has an interest in this case to secure open courts for claims of unlawful discrimination. The purpose of sanctions is to deter genuine abuses. When sanctions are used against plaintiffs who have raised a serious claim against an employer guilty of defrauding the government, then the sanctions hinder the public policy of encouraging legal actions to recover funds for the government. When the sanctions are extremely large, and issued without clear evidence of abuse, the deterrent affect applies not only to those who abuse process, but also to those with legitimate claims.

The **National Whistleblower Center (NWC)** is a not-for-profit corporation of the District of Columbia that provides education and referral services on behalf of whistleblowers. Since 1988, the Center has provided protection and assistance to thousands of whistleblowers across the United States. The Center has focused on exposing government and corporate misconduct and promoting the highest standards of ethics. It has assisted whistleblowers in exposing dangers at nuclear power stations, mishandling of evidence at the 9/11 crime scenes, and deficiencies in the FBI's counterterrorism program. It successfully advocated for the prohibition of "hush money" settlements in the Department of Labor's nuclear and environmental whistleblower program, withdrawal of "gag orders" restricting the flow of information to Congress, accreditation of the FBI crime lab, and protections for whistleblowers through the No-Fear Act, the Sarbanes-Oxley Corporate Whistleblower Protection Act, and the Civil Rights Tax Relief Act.

The NWC speaks here out of concern about the deterrent effect of the enormous sanction entered against Mary Scott. The precedent here will deter the work of the Center in encouraging whistleblowers to come forward with information about frauds against the government.

SUMMARY OF ARGUMENT

The Due Process clauses guarantee all persons an opportunity to be heard before courts deprive them of life, liberty or property. The courts below deprived Mary Scott of $1,600,000 without ever

conducting an evidentiary hearing on the grounds for the sanction or the amount of this sanction. Indeed, the district court judge never even met her.

This case exemplifies the value and significance of a hearing, in that if a hearing had been held, Scott could readily have demonstrated that she acted in good faith during discovery, and that her case was not frivolous.

The *amici* urge granting the writ of certiorari to protect the right of whistleblowers to keep their lawful awards free of arbitrary sanctions imposed without Due Process.

ARGUMENT

A. Due Process requires a hearing before imposition of sanctions based on bad faith or other alleged misconduct.

The Fifth Amendment to the U.S. Constitution, states in part as follows:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . ..

By entering a monetary judgment against Scott, the trial court is depriving her of property. The district court's judgment overtakes Scott's share of the qui tam settlement and deprives her of her statutory right to a share of that award. Particularly where the underlying facts are either wrong or disputed, and certainly the appropriate amount of any sanction was disputed, those disputes needed an evidentiary hearing for resolution. The trial court,

therefore, must afford her due process before entry of such judgment.

1. Evidentiary hearings are crucial to the Due Process clauses.

The "basic thrust" of the due process clauses is a requirement for notice and an opportunity to be heard. *Goss v. Lopez* (1975), 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725; *Fuentes v. Shevin* (1972), 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556; see also *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("[T]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.") (internal quotation omitted). These procedural safeguards reflect "the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference." *Fuentes*, 407 U.S. at 81.

Traditional notions of due process favor a person's right to present live testimony about contested issues of fact. This principle found full flower in *Goldberg v. Kelly*, 397 U.S. 254 (1970), where the Court considered the due process rights of persons facing termination of welfare benefits in a pre-deprivation hearing. The Court held that challenges submitted solely on a written record did not conform to minimal due process. *Id.* at 268. Justice Brennan wrote for the Court that:

> The city's procedures presently do not permit recipients to appear personally with or without counsel before the official who finally

> determines continued eligibility. Thus a recipient is not permitted to present evidence to that official orally, or to confront or cross-examine adverse witnesses. These omissions are fatal to the constitutional adequacy of the procedures. *Id.* at 268.

The due process failure of a document-only review was rooted in its inherent unsuitability for rendering credibility determinations:

> It is not enough that a welfare recipient may present his position to the decision maker in writing or second hand through his caseworker. . . . written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision. Id. at 269.

The Court closed by reaffirming the historical view of due process that "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." Id. at 269. On the due process priority of live witnesses, *Goldberg* is hardly an aberration. This Court has at other times stressed the importance of allowing parties to present and cross-examine live witnesses.[3]

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[3] See, *e.g.*, *Morrissey v. Brewer*, 408 U.S. 471, 488-89 (1972) (requiring parole procedures to have at

This basic thrust applies to the imposition of sanctions as they "certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980).

2. Where a party's *bona fides* are at issue, the importance of a hearing is at its zenith.

Entry of sanctions without a hearing adds to the trepidation prospective plaintiffs must feel when they decide whether to come forward with their claims of employer misconduct. Entry into the judicial system will no longer be a place for resolution of disputes based on evidence and fair play, but rather a gamble about which judge will be assigned, and what reaction that judge may have to

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a minimum, inter alia, a right to be heard in person, to present witnesses and to cross-examine adverse witnesses); *Jenkins v. McKeithen*, 395 U.S. 411, 428-29 (1969) (finding that Louisiana commission that conducted criminal inquiries and recommended prosecutions violated due process of persons investigated by failing to give them a right of cross-examination and by limiting them to submitting "pertinent" written statements of favorable witnesses). Accord, *Whitlock v. Johnson*, 153 F.3d 380, 386-88 (7th Cir. 1998) (holding that, in prison disciplinary hearings, warden's procedure of interviewing prisoner's witnesses and then summarizing testimony in an unsworn report violated due process when presentation of live testimony was otherwise feasible).

your claim. Due Process is the foundation of public trust in our judiciary. Without it, our government cannot accomplish the public purpose of any remedial law.

Subjective bad faith is the appropriate test for an award of any punitive sanctions, particularly in employment and civil rights cases. As this Court has stated, "(u)nlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms." *Blanchard v. Bergeron*, 489 U.S. 87, 96 (1989) quoting *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986) (plurality opinion).

The standard for imposing sanctions should be at its highest when such sanctions would deter parties from bringing meritorious claims that advance civil rights, uncover fraud, or serve other important government interests. Sanctions under a court's inherent authority are evaluated under the same standards as those under 28 U.S.C. § 1927. See *Schlaifer Nance & Co. v. Estate of Warhol*, 194 F.3d 323, 336 (2d Cir. 1999) (§ 1927 and inherent authority turn on same subjective standard and "only meaningful difference" is "that awards under § 1927 are made only against attorneys"); see also *Dreiling v. Peugeot Motors of Am.*, 768 F.2d 1159, 1164-65 (10th Cir. 1985) ("Section 1927 is a natural outgrowth of the inherent authority of a court to assess costs and attorney's fees . . . against a party who has acted in bad faith, vexatiously, wantonly, or for oppressive reasons" (quotation omitted)).

It is thus appropriate to consider how the court

in *Kiefel v. Las Vegas Hacienda, Inc.*, 404 F.2d 1163 (7th Cir. 1968) interpreted 28 U.S.C. § 1927 liability to hinge on whether the questioned conduct reflected a ***"serious and studied disregard*** *for the orderly processes of justice."* *Kiefel*, 404 F.2d at 1167 (emphasis added). In 1980, *Kiefel* was cited by witnesses in Congressional hearings in which an easing of the standard for sanctions awards was under consideration. *See Antitrust Procedural Improvement Act of 1979: Hearings on S.390 before the Subcomm.. On Antitrust & Monopoly of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. at 8, 27 (1979); *Antitrust Procedural Improvements and Jurisdictional Amendments: Hearings on H.R. 4047 before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary* 96th Cong., 1st Sess. at 23, 60, 152 (1979). The effort to amend §1927 failed. In a speech on the House floor, Congressman Mazzoli explained the legislators' conclusions:

> The managers on the part of the House were firm in their resolve to maintain the tough standard of current law so that the legislation in no way would dampen the legitimate zeal of an attorney in representing a client.
>
> See 126 CONG.REC. 23625-26 (1980).

The Congressional determination to preserve a high bar for the imposition of sanctions is reflected in appellate decisions. In *Avirgan v. Hull*, 932 F.2d 1572 (11th Cir. 1991) the Eleventh Circuit held that § 1927 allows district Courts to "assess attorney's fees against litigants, counsel, and law firms who ***wilfully***

abuse judicial process by conduct tantamount to bad faith." *Id.* at 1582 (emphasis added); *see also Malautea v. Suzuki Motor Co., Ltd.*, 987 F.2d 1536, 1544 (11th Cir. 1993)(§ 1927 sanctions are reserved for counsel "who wilfully abuse the judicial process"). Likewise, in *Schwartz v. Millon Air, Inc.*, 341 F.3d 1220 (11th Cir. 2003), the Court acknowledged the holding in *Avirgan* and concluded that, for purposes of § 1927, "[a] determination of bad faith is warranted where an attorney ***knowingly or recklessly*** pursues a frivolous claim . . ." *Id.* at 1225.

That a subjective bad faith standard should be required is evident from the statutory language itself; from interpretations by Congress during efforts in 1980 to obtain certain ameliorating amendments to §1927. *See* George Cochran, *The Reality of "A Last Victim" and Abuse of the Sanctioning Power*, 37 LOY.L.REV. 691, 713-24 (2004) (status of current case law and legislative history). But see, *Amlong & Amlong, P.A. v. Denny's, Inc.*, 2006 WL 4758983, *7-10 (11th Cir. 2007) (stating that "[p]lainly, an attorney threatened with sanctions under [28 U.S.C.] § 1927 is entitled to a hearing," citing *Reynolds v. Roberts*, 207 F.3d 1288, 1302 (11th Cir. 2000), despite holding that subjective bad faith is not prerequisite to sanctions under § 1927).

To delve past the objective facts and make an inference about Scott's intention to withhold evidence requires a hearing. It was an abuse of discretion for the district court to make this finding without offering her the opportunity to testify in

person.

3. The District Court erred in making a finding about Scott's intent without a hearing.

The Sixth Circuit side-stepped the due process issue when it stated:

> Scott obviously knew whether, as alleged in her affidavit, she developed her version of the minutes based on her honest recollection of what happened, rather than fabricating a version of events that she knew never occurred or inserting material to reflect what allegedly was said at a *prior* meeting.

NELA and NWC are concerned by the precedent for imposing sanctions without an evidentiary hearing when the court finds that the plaintiff's mental state was "obvious." The district court entered judgment without a hearing.

4. Summary judgment standards are instructive on the circumstances when judgment is appropriate without an evidentiary hearing.

Summary judgment is a permissible means of entering judgment without a hearing. The law on summary judgment is instructive on the circumstances when a trial court can rule on claims without a hearing. This Court has stressed on numerous occasions that in considering motions for

summary judgment, a court "must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Products*, 120 S.Ct. 2097, 2110 (2000), citing *Lytle v. Household Mfg., Inc.* 494 U.S. 545, 554-555 (1990), *Anderson v. Liberty Lobby*, 477 U.S. 242, 254 (1986), *Cont. Ore Co. v. Union Carbide & Carbon*, 370 U.S. 690, 696, n. 6 (1962). "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id., quoting Liberty Lobby*, 477 U.S. at 255. The Court "must disregard all evidence favorable to the moving party that the jury is not required to believe." *Id.* at 2110. The "court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from *disinterested witnesses*.'" *Id., quoting Liberty Lobby* at 300, emphasis added. See also, *Logan v. Denny's, Inc.*, 259 F.3d 558, (6th Cir. 2001) (district court wrongly adopted defendant's version of the facts and ignored plaintiff's evidence showing there to be a factual dispute).

Since the district court's sanction is based on a finding about Scott's bad faith, and since Scott's opposition demonstrated a genuine dispute about this material fact, the court needed to hold a separate hearing to resolve this dispute.

5. Mary Scott was entitled to an evidentiary hearing to determine the proper amount of any sanction.

When sanctions are appropriate, they serve the purpose of showing the offending party what are the true costs of their misconduct. Rule 26(g)(3) of the Federal Rules of Civil Procedure limit sanctions to "the reasonable expenses incurred because of the violation . . .."[4] Sanctions that are higher that the victim's actual costs flowing from the improper conduct are punitive.

The district court's failure to conduct a hearing on the correct amount of sanctions in this case raises distressing questions about the district court's purpose. Any purpose other than compensating the hospital for its actual costs incurred as a result of Scott's alleged misconduct would be improper. As the public record stands in this case, legitimate whistleblowers with strong evidence of fraud against the government face a legitimate fear that coming forward with their evidence could unleash a torrent of close scrutiny and a severe punishment imposed without due process.

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[4] Rule 56(g) contains the same limitation on sanctions imposed for presenting an affidavit in bad faith.

6. Whistleblowers, civil rights plaintiffs and their attorneys are depending on this Court to make federal courts a safe place to raise legitimate claims.

The myriad of employee protections in environmental, nuclear, transportation, corporate accounting and national security laws demonstrate the importance Congress has placed in the protection of employees who speak out about wrongdoing.

We are depending on this Court to set and enforce the minimum standards for the imposition of sanctions: that parties have an evidentiary hearing before they suffer a loss of their property on account of a conclusion about their good faith.

B. A civil action is not frivolous or brought in bad faith when it prevailed and resulted in payment of over $6,250,000 by the opposing party.

The district court's decision to impose sanctions against Mary Scott for the totality of respondents' legal fees and expenses for the entirety of this action was founded on the court's claim that filing this action was in bad faith. This finding suffers from an obvious contradiction: Mary Scott prevailed in the qui tam action. The United States government intervened and obtained a settlement with respondents in which they paid over $6 million. This action was not frivolous, and was not brought in bad faith.

Even her claim of retaliatory discharge, standing alone, was not frivolous. The record provides ample evidence that Scott's discharge and other adverse treatment was motivated by her protected activities. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (discriminatory remarks may prove discriminatory intent); *Moore v. KUKA Welding Sys.*, 171 F.3d 1073 (6th Cir. 1999) (temporal proximity considered with other evidence of retaliatory conduct would be sufficient to establish a causal connection); *Harrison v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 80 F.3d 1107 (6th Cir. 1996) (same).[5] See also *Miller-El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317, 2329 (2005). That the Hospital resorted to a pretext to get rid of Scott is itself evidence of unlawful motive. "Resort to a pretextual explanation is, like flight from a scene of the crime, evidence of consciousness of guilt, which is, of course, evidence of illegal conduct." *Sheridan v. DuPont*, 100 F.3d 1061, 1069 (3d Cir. 1996), quoting *Binder v. Long Island Lighting Co.*, 57 F.3d 193, 200 (2d Cir. 1995).

The False Claims Act (FCA), at 31 U.S.C. § 3730(h), protects those employees who come forward with information about frauds against the government. When they do so, they are protected

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[5] The Ninth Circuit has held that timing alone is sufficient to avoid summary judgment "even in the face of alternative reasons proffered by the defendant." *Passantino v. Johnson & Johnson Consumer Products, Inc.*, 212 F.3d 493, 507 (9th Cir. 2000).

from adverse actions by their employer. The large amount of the recovery against the hospital here raises a legitimate concern that Scott's discharge was motivated, at least in part, by her revelation of this massive fraud. Furthermore, that Scott brought such a meritorious claim should prevent a finding that her action is frivolous. Amici urge adoption of the Sixth Circuit's rule articulated in *Balmer v. HCA, Inc.*, 423 F.3d 606 (6th Cir. 2005), as follows:

> We agree with the district court that Balmer's failure to promote and sexual harassment claims were completely without merit and "frivolous, unreasonable, or without foundation." Nevertheless, we reverse the district court's award of attorney's fees to HCI. Based on the language of *Haynie* and *Tarter*, we conclude that in this circuit attorneys' fees may not be awarded to defendants where the plaintiff has asserted at least one non-frivolous claim.

See also *Haynie v. Ross Gear Div. of TRW, Inc.*, 799 F.2d 237, 242 (6th Cir. 1986), *vacated as moot*, 482 U.S. 901 (1987) (holding that "where one of the plaintiff's claims is non-frivolous, the defendant's attorney fees may not be shifted to the plaintiff even though others of the plaintiff's claims are patently without merit."); *Tarter v. Raybuck*, 742 F.2d 977, 987-88 (6th Cir. 1984) (holding that awarding attorneys' fees was an abuse of discretion even though some of plaintiff's claims were meritless). The Sixth Circuit's rule satisfies the objective of assuring that actions filed in federal courts have some merit. The rule also provides some freedom for parties

asserting novel claims or making good faith arguments for the extension of the law or its application to new factual situations.

The developed law under Rule 11[6] is instructive. "[T]he central purpose of Rule 11 is to deter baseless filings in district court," *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990), and courts must be wary of plaintiffs who may make baseless allegations. But, "Rule [11] must be read in light of concerns that it will spawn satellite litigation and chill vigorous advocacy." Id. Rule 11 "'is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories.'" *McGhee v. Sanilac County*, 934 F.2d 89, 92 (6th Cir. 1991) (quoting Fed. R. Civ. P. 11 advisory committee's note).

[6] Recent scholarship has documented a trend in civil rights cases in which defendants use § 1927 and the court's inherent power to circumvent the reforms in the 1993 amendments to Rule 11, particularly the "safe-harbor" provision; the requirement of detailed factual findings and legal conclusions; the limits on a Court's power to award fees on its own motion; and the preference for non-monetary sanctions. Hart, *And the Chill Goes On—Federal Civil Rights Plaintiffs Beware: Rule 11 Vis-a-vis 28 U.S.C. § 1927 And The Court's Inherent Power*, 37 Loy. L.A. L. Rev. 645 (Winter 2004). This case presents a new branch on this trend: the use of discovery sanctions to circumvent the limitations of Rule 11. All branches of this trend create dislocations that burden courts and taxpayers and as here, plaintiffs in civil rights and fraud cases.

People in positions of power do not like whistleblowers. Whistleblowers speak truth to power, and power does not appreciate the challenge. The courts below overlooked this possibility: even if the employer found some justification to discharge Scott, that does not mean that it was the real reason for the discharge. When the facts and inferences allow more than one conclusion, only the trier of fact can determine the real reason. Outright admissions of impermissible motivation are infrequent and plaintiffs often must rely upon other evidence. *Hunt v. Cromartie* (1999), 526 U.S. 541. The record here includes evidence of animus, timing, and dissembling that could have supported a jury decision in Scott's favor. There is no dispute that she prevailed by settlement in her *qui tam* action founded on defendant's massive fraud against the government. Therefore, her claim was not frivolous.

Respondents here subjected Mary Scott to a grueling examination of every aspect of her employment, her litigation and her life to find any grounds to oppose her claims. The discovery issue that led to the order against her was equivocal at best. That the courts below entered and affirmed sanctions against her on this issue without every affording her a hearing to contest the factual conclusions is a shocking departure from Due Process standards. It is also now a strong deterrent for other whistleblowers who must weigh the risk of such sanctions -- even when they raise a meritorious claim against those defrauding our government.

"[I]t is important that a district court resist the

understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421-22 (1978). Therefore, "[t]o determine whether a claim is frivolous, unreasonable or groundless, the court must determine plaintiff's basis for filing the suit." *Riddle v. Egensperger*, 266 F.3d 542, 548 (6th Cir. 2001). That determination in this case is flawed where the district court never conducted any hearing.

CONCLUSION

For the foregoing reasons, this Court should grant Ms. Scott's Petition for Writ of *Certiorari*.

Respectfully submitted,

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